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No. 85-2121

In The
Supreme Court of the United States
October Term, 1985

STATE OF ARIZONA,

Petitioner,

vs.

WILLIAM CARL MAURO,

Respondent.

ON WRIT OF CERTIORARI TO THE ARIZONA SUPREME COURT

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Was the Arizona Supreme Court correct in holding that a Fifth Amendment violation occurred when, in answer to a request from respondent's wife, after respondent stated he would not make a statement without a lawyer present but before he was charged or afforded a lawyer, the police allowed a conversation to commence, and then in rebuttal at trial, the state introduced a recording of this conversation, which they knew or should have known was reasonably likely to elicit incriminating statements, to counter respondent's claim of insanity?

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OPINION BELOW

Respondent accepts the Petitioner's statement of the opinion below, *State v. Mauro,* 149 Ariz. 24, 716 P.2d 393 (1986).

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STATEMENT OF JURISDICTION

Respondent accepts the Petitioner's statement of jurisdiction.

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CONSTITUTIONAL PROVISIONS INVOLVED

Respondent accepts the Petitioner's constitutional provisions involved.

———o———

STATEMENT OF THE CASE

David Anthony Mauro, age seven, died of suffocation on November 23, 1982, presumably at the hands of his father, William Carl Mauro. The defense in this case was that Mauro was not legally culpable for the acts he committed on that morning because he suffered from a mental disease or illness which rendered him incapable of appreciating the nature and quality of his actions, or if he could, then he could not appreciate the wrongfulness of those actions. Under Arizona law applicable at the time, there was a presumption of sanity, rebuttable by the defendant through evidence which created a reasonable doubt as to his sanity. The burden of proof shifted to the state to prove sanity beyond a reasonable doubt.

As with any insanity defense, a key evidentiary element is the observation of others. Mauro's actions not

only on the morning of November 23rd, but immediately before, as well as immediately after, are relevant and probative of his mental state at the time David died. His past mental history is also highly probative of Mauro's mental state on that morning.

Bill Mauro entered into a psychotic state approximately four days prior to David's death. His wife testified that he spent the time pacing the floor, restless and sleepless days on end, reading the Bible and praying constantly, in an effort to ward off the space creatures which were outside the family trailer, waiting to capture his family's souls. Other hallucinations included the spirit of Linda Mauro's sister, a professed witch, who had come specifically to take Linda Mauro's soul. David Mauro's imprisonment in the bathroom began shortly after Bill Mauro's psychotic episode manifested itself in such bizarre behavior. (J.A. at 234).

David died on the morning of November 23, 1982, at approximately 8:00 A.M. His father rushed from the bathroom to retrieve a suitcase from the bedroom and return to the bathroom. Moments later, he emerged with the suitcase, instructed his family to pray and left, wearing only a light cotton shirt and pants. It was a cold November morning, and Mauro had no shoes, no socks, no jacket. Clutching the suitcase, Bill Mauro headed for an empty field, where he buried the suitcase beneath a cross of logs. Mauro then appeared at the nearby K-Mart store at approximately 9:30 A.M. Several employees testified as to Mauro's behavior during the short period of time he was in the store, and all of them portrayed a man who was "crazed" or "delirious", claiming to have killed the beast

or the devil. Mauro was insistent that they telephone the police, stating that he had killed the devil and later explaining that the devil was his son. (J.A. at 232-233).

When the police arrived, Mauro continued to rant about having killed the devil, his son. Mauro wanted very much for the police to discover the suitcase because, whatever was in it was still alive. Mauro insisted that they handcuff him, stating that he would not hurt anyone, obviously still waging his private war with the devil. Mauro directed the police to the field where he had buried the suitcase and became quite agitated when the police could not immediately find the suitcase. He stated "I'll take the rap," and "I had to do it, it wasn't my son, it was the devil." He then pointed out the specific pile of logs where the suitcase was buried and the police uncovered it, retrieving David's body. [J.A. at 233, R.T. of Jan. 5, 1984 (Trial) Vol. 2 at 284.]

Mauro was advised of his *Miranda* rights twice following the discovery of the body, first on the way to the station by Sergeant Byron Allen, (J.A. at 68-69), and then, at the Flagstaff police department by Captain Gary Latham and Detective Bill Trimble. (J.A. at 77). At that time, Mauro said he did not want to talk with police officers until he had an attorney. The police officers, at least in the immediate, ceased all questioning of him. (J.A. at 81-82, 93, 98-99, 102-103). Mauro remained, however, in Captain Latham's office, awaiting transport to the Coconino County jail.

After police had been dispatched to K-Mart, Linda Mauro called to report the disappearance of her husband and her son. By that time, the body had already been discovered and two officers went to her house to inform her

of David's death and to accompany her to the station. Detective Frank Manson questioned her initially, at which time she informed him of her husband's extensive mental health problems over the past twelve years. She then asked to speak with her husband, which Detective Manson tried to discourage. She insisted and, in an effort to "pass the buck" he told her if his supervisor agreed, he would allow it. (J.A. at 110-114).

Detective Manson then approached Sergeant Allen with Linda Mauro's request. Manson reiterated that he did not think it was a good idea but Allen disagreed, telling Manson they should be able to speak together and he, Manson, was to be present, along with a tape recorder. Allen cited four reasons for Manson's presence: (1) Concern for Linda Mauro's safety; (2) Ignorance about the extent of Linda Mauro's involvement in the homicide; (3) The possibility of husband and wife concocting a story or "getting their story straight"; (4) The potential for an escape attempt. Reasons one and four could have been alleviated by waiting until Mauro was transported two blocks to the county jail, and having Linda and Bill speak through the appropriate visitation facilities provided there. (J.A. at 75-76).

There was no reason given for the presence of a tape recorder in this session, other than Detective Manson, who explained that he taped the conversation in order to preserve it. Linda Mauro was informed that she could see her husband, but only under the conditions that Detective Manson be present and the conversation would be tape recorded. (J.A. at 116). Significantly, Bill Mauro was never asked if he wanted to see his wife, nor was he in-

formed that a police officer would be present, nor that the conversation would be recorded. The conversation between Bill and Linda Mauro, albeit brief, was pregnant with incriminating statements.

As noted earlier, Mauro's behavior on November 23, 1982 was significant to both prosecution and the defense in establishing or refuting the insanity defense. A neighbor was called in to testify as to Mauro's behavior upon leaving the trailer. K-Mart employees were called in to testify about his behavior at the store. Police officers testified as to his behavior during the discovery of the body and at the police station. Sheriff's deputies were called in to testify as to Mauro's behavior at the jail. Dr. Dean Gerstenberger, a local psychiatrist, who had the rare opportunity to visit with his patient on the day of the homicide, testified extensively as to his behavior that day in the jail. Bruce Griffen, an attorney with the law firm appointed to represent Mauro testified as to his behavior in the jail. A deputy county attorney and a justice court clerk were called in to testify as to Bill Mauro's behavior at the initial appearance that afternoon.

Dr. Gerstenberger testified extensively as to Mauro's psychotic state, particularly on November 23. Specifically, Dr. Gerstenberger explained how, even during a psychotic episode, an individual can appear to be more grounded in reality. He explained that he uses a scale of 0 to 3 to determine the degree of cognition, with 0 being totally grounded in reality and 3 being totally out of touch with reality. Based upon his observations, as well as the statements of those seeing Bill Mauro, the tape recording at the police station as well as the tape recording made with

attorney Don Bayles, it was Dr. Gerstenberger's opinion that Bill Mauro fluctuated between a 1 and a 2½ during that day, the 2½ representing his actions in the trailer, as described by Linda Mauro and the low rating of 1 describing his behavior at the police department. However, as Dr. Gerstenberger pointed out, the appearance of being in touch with reality does not in any way indicate that Mauro's thought processes were intact and cited several examples of psychotic patients who, at one moment could speak rationally and, the next moment, take off on a totally irrational conversation. (J.A. at 182-184).

Dr. Gerstenberger originally diagnosed Bill Mauro as a paranoid schizophrenic; however, with greater information concerning not only Bill's past history, but his mother's diagnosis as a manic depressive, the diagnosis was changed to manic depression, now known as bi-polar affective disorder. Bill Mauro has a documented history of at least ten hospitalizations between 1970 and 1982, including a hospitalization during a psychotic episode in February, 1982, wherein Dr. Gerstenberger was called as the treating physician. Dr. Gerstenberger had an opportunity to see Bill Mauro on at least a dozen occasions subsequent to the homicide.

The State relied on the diagnosis of Dr. Michael Cleary of Phoenix, who had the opportunity to observe Bill Mauro on two occasions, the first of being approximately four months after the homicide. Dr. Cleary initially diagnosed Bill Mauro as a compulsive person with paranoid traits and, based upon observations by Daniel and Linda Mauro on the morning of November 23rd, Dr. Cleary arrived at the conclusion that Bill Mauro was not

insane. However, on rebuttal, Dr. Cleary admitted that there was some doubt in his mind as to Bill Mauro's mental state on that morning, particularly in light of some facts that Linda Mauro conveniently forgot to tell Dr. Cleary, which may well have changed his mind. [R.T. of Feb. 8, 1984 (Trial) Vol. 19 at 3473-3475].

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SUMMARY OF ARGUMENT

The Arizona Supreme Court correctly held that the conversation between Bill Mauro and his wife, in the presence of a police officer and tape recorder, was the functional equivalent of custodial interrogation, defined and prohibited under *Rhode Island v. Innis*. Mauro's Fifth Amendment protection against self-incrimination was violated when, after Mauro had invoked his *Miranda* right to counsel, the police set up a situation where they should have known that it was reasonably likely that incriminating statements would be made. Further, it is a violation of Mauro's Fifth Amendment right to counsel for the police to have initiated this contact, tantamount to an interrogation, once Mauro had requested an attorney.

The Sixth Amendment right to counsel had not yet attached, inasmuch as the adversarial process had not begun. The Arizona Supreme Court did not apply a Sixth Amendment standard in determining that police conduct was the functional equivalent of custodial interrogation. Merely citing language from a Sixth Amendment case is not tantamount to applying a Sixth Amendment standard in determining whether police conduct amounted to interrogation.

The due process considerations enumerated by the Court in *Wainwright v. Greenfield* were not applied by

the Arizona Supreme Court to prohibit the use of the tape or the conversation. The rationale behind *Wainwright v. Greenfield, however,* was used to demonstrate that the State's legitimate interest in proving Mauro's behavior to be sane would be preserved by allowing carefully framed questions concerning his behavior which avoid any mention of the constitutional violation against him, which is the conversation between Mauro and his wife.

ARGUMENT

I. THE ARIZONA SUPREME COURT DID NOT INCORRECTLY APPLY SIXTH AMENDMENT STANDARDS TO A FIFTH AMENDMENT DETERMINATION OF VIOLATION OF RIGHT TO COUNSEL.

The State of Arizona, in its brief, pp. 10-15, explains quite eloquently the law surrounding Fifth and Sixth Amendment rights to counsel. The right to counsel under each amendment stems from very different constitutional concerns. The Fifth Amendment right to counsel stems from the desire to protect suspects from self-incrimination. *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed. 2d 694 (1966). In *Moran v. Burbine,* — U.S. —, 106 S.Ct. 1135 (1986), this Court reiterated the *Miranda* Court's concern that custodial interrogations puts "compelling pressure" upon suspects which, by their very nature, work to undermine the suspect's will, and often compels him to speak where he otherwise might not. It is further explained that the *Miranda* obligations were imposed upon police officers in order to "to combat this inherent compulsion and thereby protect the Fifth Amendment privilege against self-incrimination." 106 S.Ct. at 1140.

A more detailed discussion of the functional equivalent of interrogation standards found in *Rhode Island v. Innis*, 446 U.S. 291, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980), the standard by which Fifth Amendment right to counsel violations are determined, will follow in the ensuing section. With that, the attention is focused on the State's discussion of the Sixth Amendment right to counsel. The Arizona Supreme Court and Mr. Mauro readily agree with the State of Arizona that the Sixth Amendment protects defendants once the adversarial process has begun, and that, clearly, Mr. Mauro's Sixth Amendment right to counsel had not attached at the time of the unconstitutional conversation.

An in-depth review of the Arizona Supreme Court's opinion (J.A. at 240-246) reveals that the case was clearly decided on Fifth Amendment principles and that the *Rhode Island v. Innis* standard of determining the functional equivalent of custodial interrogation was applied. Arizona's high court determined that the police officers knew that it was reasonably likely that Mauro would make incriminating statements. With that in mind, a tape recorder captured the conversation. (J.A. at 245).

In determining that the officers knew it was reasonably likely that Mauro would make incriminating statements, the Arizona court focused on the intent of the police officers. Since the intent of the police officers was so clear, it was not necessary to determine the perceptions of Mr. Mauro, although he may well have been unusually disoriented or susceptible to the influences of police officers.

However, in dictum, the Arizona Supreme Court quoted *Maine v. Moulton*, — U.S. —, 106 S.Ct. 477 (1985), which is, in fact, a Sixth Amendment case. The Arizona Supreme

Court found it necessary to explain the rights of suspects who had invoked the right to silence. "In doing, so we believe the language in a recent United States Supreme Court opinion on the right to counsel under the sixth Amendment is equally applicable here:

> '[The right to counsel] is not violated whenever—by luck or happenstance—the State obtains incriminating statements from the accused after the right to counsel has attached [Citation omitted]. However, *knowing exploitation* by the State of an opportunity to confront the accused without counsel being present is as much a breach of the State's obligation not to circumvent the right to assistance of counsel as is the intentional creation of such opportunity.'

Maine v. Moulton, — U.S. —, 106 S.Ct. 447, 487 (1985) (emphasis added)." (J.A. at 246).

The State has seized upon the mere use of Sixth Amendment language to argue that the Sixth Amendment standard of "deliberately eliciting" found in *Massiah v. United States,* 337 U.S. 201 (1964) or "knowing exploitation" found in *Maine v. Moulton* was improperly used in this Fifth Amendment case. The State would put the Fifth and Sixth Amendments in separate vacuums, emphasizing their differences and ignoring their similarities. However, while the standards themselves remain separate for determining whether the right to counsel has been violated under the Fifth or Sixth Amendment, the language is often interchanged.

The Sixth Amendment case, *Kuhlmann v. Wilson,* 106 S.Ct. 2616 (1986) states "The defendant must demonstrate that the police and their informant took some action, beyond merely listening, that was designed deliberate-

ly to elicit incriminating remarks." 106 S.Ct. at 2630. This is strikingly familiar to the language found in *Rhode Island v. Innis,* footnote 7, which states in particular "Where a police practice is designed to elicit an incriminating response from the accused, it is unlikely that the practice will not also be one which the police should have known was reasonably likely to have that effect." 446 U.S. at 301, 100 S.Ct. at 1190.

In the line of cases stemming from *Massiah,* this Court has held that when the Sixth Amendment right to counsel has attached, the police may not "deliberately elicit" incriminating responses, either directly or indirectly. See, e.g., *Maine v. Moulton.* This Court has also held that the police may not interfere with a defendant's right to counsel under the Sixth Amendment by "knowingly exploiting" an opportunity any more than they can intentionally create that opportunity under the "deliberately elicit" prohibition. *Maine v. Moulton.*

While "deliberately elicit" and "knowing exploitation" are not standards for determining interrogation under the Fifth Amendment, this Court did use the language of the "deliberately elicit" standard in *Rhode Island v. Innis* as a measuring stick to determine police intent. This is no different than the Arizona Supreme Court's use of the "knowing exploitation" language to gauge the intent of the police officers.

Another example of the juxtaposition of Fifth and Sixth Amendment language is found in *United States v. Henry,* 447 U.S. 264, 100 S.Ct. 2183, 65 L.Ed.2d 115 (1980). In that case, Justice Powell, in his concurring opinion, stated that "to demonstrate an infringement of the Sixth

Amendment, a defendant must show that the government engaged in conduct that, considering all of the circumstances, is the functional equivalent of interrogation." (Citations omitted). 447 U.S. at 277, 100 S.Ct. at 2190. Fifth Amendment language, i.e. the functional equivalent of custodial interrogation, is used to describe a Sixth Amendment situation.

A further review of the Arizona Supreme Court opinion would explain why the "knowing exploitation" passage is appropriate. Arizona state law allows for police officers to testify as to conversations overheard when there is no evidence of any intent to surreptitiously eavesdrop. *State v. Narten*, 99 Ariz. 116, 407 P.2d (1965) *cert. denied* 1984 U.S. 1008, 86 S.Ct. 1985 (1966). The Arizona Supreme Court was distinguishing between incidents where portions of the conversation are overheard by police officers and there is no intent to surreptitiously eavesdrop, as compared to this situation, where the police officers seized upon the opportunity presented by Mrs. Mauro to overhear any incriminating statements Bill Mauro might make. The trial court erroneously applied *Narten* as controlling. (J.A. at 216).

If the police officers, in the instant case, had asked Linda Mauro to speak with her husband, and then recorded the conversation, their conduct would have been condemned as deliberately eliciting incriminating statements, thus showing the intent of the police officers to create a situation they knew was reasonably likely to elicit incriminating statements. However, Mrs. Mauro requested the conversation herself. Nevertheless, the police knowingly exploited the request in order to create a situation where incriminating statements might be made. Knowing

they could no longer interrogate Mauro directly, they seized upon an indirect method to get him to talk. They had total control over the situation, once Linda's request was made. It was their decision to put Mr. and Mrs. Mauro together. It was their decision to place a police officer, armed with a tape recorder in the room. It was their decision to withhold the information from Bill Mauro that his wife wanted to speak with him. It was their decision to withhold from Bill Mauro the conditions under which the conversation took place.

No, the police did not create the situation by requesting Linda to speak with Bill. However, once that request was made, the police exploited the opportunity, taking total control of the situation, knowing it was reasonably likely that incriminating statements would be made. Their conduct is as egregious as if they had prompted the conversation themselves.

There was no Sixth Amendment violation, since the adversarial proceedings had not yet commenced. However, neither did the Arizona Supreme Court apply an improper standard by condemning the knowing exploitation of the golden opportunity to do indirectly what they could not do directly.

II. THE ARIZONA SUPREME COURT PROPERLY FOUND THE CONVERSATION BETWEEN MAURO AND HIS WIFE AMOUNTED TO THE FUNCTIONAL EQUIVALENT OF CUSTODIAL INTERROGATION AS DEFINED BY RHODE ISLAND v. INNIS.

A proper reading of the Arizona Supreme Court opinion dictates the finding that the conversation itself

was impermissible, since allowing the conversation to commence was the functional equivalent of custodial interrogation, as defined and prohibited under *Rhode Island v. Innis*. The Arizona Supreme Court applied the principles announced in the *Innis* case when it noted that interrogation includes a "practice that the police should know is reasonably likely to evoke an incriminating response from a suspect." *Rhode Island v. Innis*, 446 U.S. at 301, 100 S.Ct. at 1690 (1980). "The focus on ascertaining whether particular police conduct amounts to interrogation then is not on the form of the words used but the intent of the police officers and the perceptions of the suspect." (citation ommited) (J.A. at 245).

The State questions the propriety of the determination by the Arizona Supreme Court that the police officers should have known their actions were reasonably likely to evoke an incriminating response. The facts of the case, quite simply, support the finding by the Arizona Supreme Court that the officers knew it was reasonably likely that incriminating statements would be elicted.

Detective Allen testified:

Q. . . . Certainly when you sent an officer in there to listen to that conversation you knew that it was possible that he might make incriminating statements?

A. That's correct.

Q. And obviously you want to record that conversation so as to have in it a record of those incriminating statements.

A. That's correct. (J.A. at 241).

Detective Manson testified:

Q. Frank, certainly you were aware that during the conversation either Linda or my client may have given an incriminating statement?

A. Yes.

Q. And obviously one of the purposes of your tape recording the interview was to take down any such statements?

A. Yes, sir. (J.A. at 242).

The State argues that the testimony alludes to the knowledge of a "mere possibility" that incriminating statements might be made. Certainly the Arizona Supreme Court did not make its finding based upon that testimony alone. The totality of the circumstances must be considered. There were four reasons why the police officer was present in the room with Bill and Linda Mauro. (1) They were concerned for Linda Mauro's safety. (2) They were "somewhat in the dark" as to Linda Mauro's involvement in the homicide. (3) They were afraid that Bill and Linda Mauro might concoct a story or otherwise get their stories straight, for the benefit of the police. (4) They were worried about an escape attempt. Clearly, reasons number two and three show a direct knowledge that it was reasonably likely that Bill or Linda or both may make incriminating statements. Obviously, they were hoping Bill or Linda would discuss the homicide, perhaps shedding light on Linda's involvement, as well as clarifying Bill's role in his son's death. (J.A. at 101). Secondly, by expressing their concern that Bill and Linda may try to concoct stories, it shows a knowledge that it was reasonably likely that incriminating statements would be made.

This Court stresses in *Rhode Island v. Innis* that the police "cannot be held accountable for the unforeseeable results of their words or actions." 100 S.Ct. at 1690. However, the concerns show that the police were unaware of the extent of Linda's involvement, and the possibility of collusion between Bill and Linda prompted not only the presence of a police officer, but a tape recorder, as well. It was not only foreseeable but desirable, as well, that incriminating statements would be preserved.

The argument that it was necessary for a police officer to be present for the safety of Linda Mauro and to prevent an escape attempt is undoubtably legitimate. However, it is inconceivable that two primary suspects in a homicide would be allowed to converse together for "humanitarian reasons". If the police officers were so purely compassionate toward Linda, yet faced with the problems of safety and a possible escape attempt, the situation was easily remedied. As Capt. Latham testified, both problems would be eliminated by allowing Bill and Linda to converse in private at the county jail, in facilities designed to prevent both problems. (J.A. at 106-107).

The Arizona Supreme Court relies primarily upon the intent of the police officers. Indeed, there was no necessity to discuss the perceptions of the defendant, since the intent of the police officers was so very clear. This Court, in *Rhode Island v. Innis,* noted that, in determining whether the police should know that their words or actions are reasonably likely to elicit an incriminating response, the focus is upon the perceptions of the suspect rather than the intent of the police. *Rhode Island v. Innis,* 100 S.Ct. at 1690. However, this Court further explained. "This focus reflects the fact that the *Miranda* safeguards were

designed to vest a suspect in custody with an added measure of protection against coercive police practices, without regard to the objective proof of the underlying intent of the police." *Id.*

To place upon the criminal defendant the burden of proving the subjective intent of the police officers would so cripple him that it would render the safeguards of *Miranda* nonexistent. Only in extremely rare cases will subjective intent of the police officers be so clear. This was recognized by this Court in footnote 7 of *Rhode Island v. Innis,* which states "This is not to say the intent of the police is irrelevant, for it may well have a bearing on whether the police should have known that their words or actions were reasonably likely to evoke an incriminating response." 100 S.Ct. at 1690. This is precisely the case at bar.

The State clearly misapplies the standard for determining whether the police knew or should have known that their actions were reasonably likely to elicit incriminating information. The State argues that the lack of knowledge by Sgt. Allen of Mauro's bizarre behavior and mental illness history is relevant in determining police intent. However, under *Innis,* the unusual disorientation of a defendant is relevant only in determining his perceptions. Further, the State may not claim a lack of knowledge of Mauro's mental health problems when Det. Manson, who was one of two officers involved in setting up the conversation, had extensive knowledge of the problems. Lastly, both Sgt. Allen and Det. Manson observed this bare footed, scantily clothed individual claiming to have killed the devil earlier that November morning.

Should this Court hold that it was improper for the Arizona Supreme Court to rely solely on the intent of the

police officers in determining that they knew it was reasonably likely that incriminating statements would be made, a proper remedy would be for the Arizona Supreme Court to analyze the perceptions of the defendant from the entire record on appeal.

The State attempts to analogize this case with *U.S. ex. rel. Church v. De Robertis,* 771 F.2d 1015 (7th Circuit 1985). In that case, one brother was put in a cell with another brother, who had requested counsel and otherwise invoked his *Miranda* rights. After the two brothers had been in the cell for awhile, the defendant decided to make a statement. He initiated the contact with the police officers, signed a waiver in writing, and proceeded to make a confession. This is obviously a completely different situation than the case at bar. Bill and Linda Mauro had a police officer present with them at all times, while defendant Church did not. Secondly, the police contact was initiated by the defendant himself, a situation not present with Mr. Mauro.

The importance of the defendant initiating contact was expressed in *Edwards v. Arizona,* 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981). This Court held that

> "when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he had been advised of his rights. We further hold that an accused, such as Edwards, having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused initiates further communication, exchanges, or conversations with the police."

451 U.S. 484-485, 101 S.Ct. 1884-1885.

It is absolutely clear that no contact was initiated by defendant Mauro in this case.

This was recognized in a footnote found in *Moran v. Burbine*, 106 S.Ct. 1135 (1986). Footnote one states specifically that the holding in *Edwards* dictates that "when a suspect has requested counsel, the interrogation must cease, regardless of any question of waiver, unless the suspect himself initiates the conversation. In other words, there cannot be a valid waiver of the right to counsel, once it has been invoked, unless and only, if the defendant himself initiates the conversation." 106 S.Ct. at 1142. This Court has frequently emphasized that a favorable characteristic of Edwards is the "bright-line" application of the rule. *Michigan v. Jackson*, — U.S. —, 106 S.Ct. 1404, 1410 (1986). *Smith v. Illinois*, 469 U.S. —, 105 S.Ct. 490, 494, 83 L.Ed.2d 488 (1984). *Solem v. Stumes*, 465 U.S., at 646, 104 S.Ct. at 1343. Clearly, if a custodial interrogation is found, the "bright-line" application of *Edwards* dictates that there was no valid waiver of Mauro's right to counsel. Mauro did not initiate the contact with the police; rather it was the police, through Linda Mauro's insistence, who initiated the contact with Bill Mauro. The police had total control over the situation and kept Linda Mauro apprised, while keeping Bill Mauro in the dark. No valid waiver of the Fifth Amendment right to counsel can be found merely because Bill Mauro chose to speak in front of police officers.

III. THE ARIZONA SUPREME COURT DID NOT IMPROPERLY APPLY THE PRINCIPLES OF WAINWRIGHT v. GREENFIELD TO EXCLUDE THE TAPED CONVERSATIONS.

Again, a clear reading of the Arizona Supreme Court opinion shows that the taped conversation was improperly

admitted because of the violation of principles found in *Rhode Island v. Innis*. In fact, it specifically was not decided upon principles found in *Wainwright v. Greenfield*. In a footnote to the opinion, the Arizona Supreme Court held specifically that portions of the taped conversation may or may not be excluded, based upon due process considerations it was not necessary to do piecemeal analysis of each statement, however in as much as the whole conversation was excluded under Fifth Amendment principles. (J.A. at 247-248). Again, *Wainwright v. Greenfield* was not controlling in this case; however, it was merely used in an effort to be instructive.

This analysis was well founded, based upon the opinion of this Court in *Wainwright v. Greenfield*, which held that post *Miranda* silence, as well as the invocation of that right and the right to counsel under *Miranda* may not be used as evidence for sanity. This decision was based upon the principles enunciated in *Doyle v. Ohio*, 426 U.S. 610 (1976), and its progeny, which states that cross examination of a defendant by asking him why he did not explain his conduct at the time of his arrest was fundamentally unfair and a violation of the due process clause of the Fourteenth Amendment. The common thread of the cases is that it is the implied assurance that the invocation of the right would not be used against a criminal defendant, as well as the ambiguity of what remaining silent means, which leads to the fundamental unfairness.

However, one of the primary concerns of *Doyle* and its progeny, which does not exist in *Wainwright v. Greenfield*,

nor the instant case, deals with the concern that a criminal defendant may perjure himself or herself, and that there would be no way to impeach him by prior inconsistent statements. In fact, many of the cases cited by the State that, when used for impeachment purposes, post *Miranda* silence may be admitted. However, the cases cited by the State deal with the cross examination of a criminal defendant who has elected to testify, and these statements are elicited for the purposes of impeachment, based upon testimony of the defendant. See e.g., *Fletcher v. Weir,* 455 U.S. 603 (1982); *Jenkins v. Anderson,* 447 U.S. 231 (1980); *Anderson v. Charles,* 447 U.S. 404 (1980).

This Court in *Doyle,* was concerned over the risk that exclusion of the evidence would merely provide a shield behind which the defendant may perjure himself. This concern was expressly pointed out in *Wainwright v. Greenfield* as being inapplicable both in that case and the case at bar, and is found in footnote 8: "The constitutional violation might thus be especially egregious because, unlike Doyle, there was no risk that exclusion of the evidence (would) merely provide a shield for perjury." 426 U.S. at 626, 96 S.Ct. at 248 (Stevens, J. dissenting)." In neither *Greenfield* nor the case at bar did the defendant take the stand, nor was the need for impeachment present.

The state complains that it should be allowed to introduce evidence of a taped conversation between Mauro and his wife, regardless of whether or not it is a violation of *Miranda,* simply to combat testimony from the Defendant that was presented in favor of the insanity defense. Specifically, Attorney Bruce Griffen testified as to his observations of Mauro's behavior. Notably, Mr. Griffen did not

testify as to any conversation between himself and Mauro, or between the other attorney, Don Bayles and Mauro. He testified merely as to observations of Mauro's behavior in the jail cell shortly after being transported there. The State argues that, because a privileged conversation (although no conversation was reported by Mr. Griffen) was admitted, that Mauro has waived all constitutional rights. Further, the State argues that the admission of a tape between Don Bayles and Bill Mauro, arguably a privileged conversation, negates Mauro's right to assert any privilege under *Miranda*. However, the incidents are based on completely separate legal premises. The conversation between Don Bayles and Bill Mauro is a privileged conversation under the attorney-client privilege. It is Bill Mauro's right to waive this privilege, if he so desires, as he obviously did by introducing the tape into evidence at trial. However, a waiver of this privileged communication does not mean that he waives all privileged communication, nor does it mean that he waives his *Miranda* rights nor his right to exclude *Miranda* violative statements.

The Arizona Supreme Court insures that rebuttable testimony is allowed. In other words, the important facts concern Bill Mauro's behavior on the day of the homicide. Every one who observed him was allowed to speak of those observations. The Arizona Supreme Court makes that clear, in its opinion, when it specifically sets forth guidelines, stating that police officers may, through carefully framed questions, describe Bill Mauro's behavior and that he was able to talk rationally at the police station. The police officers were not precluded from testifying as to the behavior; merely, as to this specific conversation which was held to be in violation of *Miranda*.

Indeed, the Arizona Supreme Court merely used the rationale behind *Wainwright v. Greenfield,* which also allows for testimony of a defendant's behavior as being probative of his mental state, through carefully framed questions which do not bring up his constitutional rights. It would be fundamentally unfair to allow this state to do indirectly what it cannot do directly, i.e. admit a *Miranda* violative conversation, full of incriminating statements, as evidence of the insanity defense.

CONCLUSION

The Arizona Supreme Court correctly determined that allowing a conversation between Bill Mauro and his wife constituted the functional equivalent of custodial interrogation. This conclusion is founded squarely upon the principles enunciated in *Rhode Island v. Innis.* The Arizona Supreme Court correctly determined that the police officers knew or had reason to know that it was reasonably likely that incriminating statements would be elicited if the conversation were allowed. The Arizona Supreme Court, while acknowledging that this case was not controlled by Sixth Amendment standards, correctly held that knowingly exploiting an opportunity to elicit statements from the suspect is every bit as egregious as deliberately directing an opportunity to do the same. Once the right to counsel under the Fifth Amendment has been asserted, the police officers may take no more action to elicit incriminating responses, without first being approached by the suspect. Lastly, the Arizona Supreme Court did not decide this case under the principles announced in *Wainwright v. Greenfield*, and the due process clause of the Fourteenth Amendment. *Wain-*

wright v. Greenfield merely illustrated that evidence of behavior may be introduced at trial to prove sanity, even though evidence of silence may not.

The opinion of the Arizona Supreme Court should be affirmed.

Respectfully submitted,

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